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MISC BHD

v.

SCANDINAVIAN BUNKERING (SINGAPORE) PTE LTD

B

COURT OF APPEAL, PUTRAJAYA
KN SEGARA JCA
ABU SAMAH NORDIN JCA
ABDUL WAHAB PATAIL JCA
[CIVIL APPEAL NO: W-02(IM)-2351-2009]

C

6 JULY 2010

CIVIL PROCEDURE: *Summary judgment - Appeal against - Breach of contract - Wrongful termination of - Whether appellant had the right to terminate contract - Elements of liability for breach of contract -*

D

Whether proved - Whether judgment correctly entered with damages to be assessed - Rules of the High Court 1980, O. 14

CONTRACT: *Breach - Agreement - Non-acceptance of delivery of marine fuel oil and wrongful termination of fixed price agreement -*

E

Whether appellant had the right to terminate agreement - Terms and conditions of agreement - Whether plain and unambiguous - Elements of liability for breach of contract - Whether proved - Whether judgment correctly entered with damages to be assessed - Rules of the High Court 1980, O. 14

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This was an appeal from the decision of the High Court judge granting leave to the respondent (plaintiff/SBS) to enter summary judgment against the appellant (defendant/MISC) on liability with damages to be assessed. The plaintiff's claim was for breach of contract by the defendant for non-acceptance of delivery of

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bunker (marine fuel oil, hereinafter referred to as MFO) and the wrongful termination of the Bunker Fixed Price Agreement/Fixed Price Contract dated 16 September 2008 (hereinafter referred to as the FPC) for the supply and delivery of MFO to the defendant for the period 1 October 2008 to 31 December 2008. Briefly, the

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facts were that on 10 September 2008 MISC issued an open invitation to bid for the supply of MFO towards concluding a Bunker Fixed Price Agreement. Marinehub (Malaysia) Sdn Bhd (Marinehub) submitted its bid and MISC accepted it. A letter of award dated 16 September 2008 was issued by MISC to

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Marinehub which was duly accepted by Marinehub. A binding

contract for the supply of 102,600 MT marine fuel oil at the total price of USD57,435,480 on monthly basis from 1 October 2008 to 31 December 2008, at the fixed price of USD559.80/MT was concluded between MISC and Marinehub, incorporating Part I and Part II of the ITB and the letter of award as the terms of the fixed price contract (FPC). Simultaneously, Marinehub to the knowledge of MISC entered into a fixed price contract with Scandinavian Bunkering (Singapore) Pte Ltd (hereinafter referred to as SBS). Subsequently, a dispute arose as to MISC's alleged entitlement to carry forward from October 2008, the 13,865 metric tons of MFO, for delivery in November 2008, at the 'Means Platt Bunkerwire at the contracted port on delivery date' by virtue of cl. 3.3 found in the Invitation to Bid documents, rather than at the fixed price of USD559.80 per metric ton as set out in the letter of award. On 10 November 2008 MISC sought to place two orders for MFO amounting in total to 2,950 metric tons under order 19 and order 20 for delivery to vessels at Means Platt Bunkerwire rate. With effect from 12 November 2008 Marinehub assigned absolutely and irrevocably to Scandinavian Bunkering (Singapore) Pte Ltd (SBS) all its rights, interest, benefit and title to the Bunker Fixed Price Agreement (FPC) with MISC. MISC terminated the FPC by its email dated 14 November 2008 to Marinehub on the alleged grounds that Marinehub had failed to confirm the orders requested. SBS accepted MISC's repudiation of the FPC and thereby brought to an end the FPC and sought damages from MISC for breach of contract and wrongful repudiation of the FPC. On 19 November 2008, the solicitors for SBS gave notice to MISC claiming damages in the sum of USD27,499,371.90. The issue that arose herein was whether MISC had the right to terminate the Bunker FPC on the grounds that Marinehub failed to confirm order 19 and order 20 in November 2008 for the carry forward of 2950 metric tons from October at Means Platt Bunkerwires price.

Held (dismissing the appeal with costs; affirming decision of High Court)
Per KN Segara JCA delivering the judgment of the court:

(1) MISC had purported to terminate the letter of award dated 16 September 2008 pursuant to cl. 2.2. However, a close scrutiny of the letter of award did not disclose cl. 2.2. Therefore, on this very ground itself the termination would be

without any basis, unlawful and void. Clause 3.3 which formed part of MISC's standard template of terms and conditions when calling for the supply of MFO was never intended to apply to a fixed term, fixed price and fixed quantity contract and was never intended to be filled up. There was no written agreement executed by the parties incorporating cl. 3.3 with the blanks duly filled up. The Fixed Price Contract/Agreement (letter of award 16 September 2008) by its very term and purpose was to ensure the supply of MFO at a 'fixed price', that was, at USD559.80 per metric ton and at a total award price of USD57,435,480. This was to provide certainty of the price MISC would have to pay for MFO over the period of three months from 1 October 2008 to 31 December 2008 and the price the supplier could expect to receive for its three months supply of MFO to MISC. (paras 33 & 35)

(2) The total award price of USD57,435,480 was computed on the fixed price of USD559.80 per metric ton for 102,600 metric tons of MFO to be supplied over three months. If MISC had an option to purchase unutilised volumes up to 34,200 metric tons of MFO per month at market price by carrying it forward, there would have been no reference in the letter of award to the predetermined total award price. An exercise of the option at market price would leave the total award price fluid. The total award price would have increased or decreased based on the market price fluctuations. In the circumstances, an option to carry forward MFO to the following month at a floating market price was certainly not contemplated by the letter of award or by the parties at the material time. The reference to the 'total award price' in the letter of award imposed an obligation on the part of MISC to take delivery of specific quantity of MFO namely, 102,600 metric tons, over a period of three months at a monthly rate of 34,200 metric tons. This was confirmed by MISC in cl. 5 Part 1 of the invitation to bid. (paras 38 & 39)

(3) Business exigencies of a fixed price contract require parties to lock the price for the supply of MFO at the fixed rate, for a fixed period, in the absence of any unequivocal agreement to the contrary. The transaction would not admit a carrying forward of an entire month's supply of MFO at a floating market price of the Means Platt Bunkerwire. The incomplete

cl. 3.3 must yield to the certain, clear and express provisions as to price in cl. 5 Part I and cl. 5 Part II of the Invitation to Bid documents. The price payable and the period of the FPC were plain and unambiguous, as seen in cl. 5 Part I, cl. 5 Part II of the invitation to bid documents read together with the letter of award, in the absence of a duly executed written agreement embodying all the terms and conditions of the three month fixed price contract. In the circumstances of this case and in the context of the three month contract, cl. 3.3 of Part II of the invitation to bid documents was irrelevant and inapplicable to the FPC. (paras 40 & 41)

(4) All elements on liability for breach of contract by MISC had been made out. In that event, in an order 14 application, judgment could be properly entered (*Avel Consultants Sdn Bhd & Anor v. Mohamed Zain Yusof & Ors*). MISC had no *bona fide* defence to SBS's claim on the issue of liability and the trial judge had correctly entered judgment with damages to be assessed. (paras 42 & 43)

Bahasa Malaysia *Translation Of Headnotes*

Ini adalah rayuan terhadap keputusan hakim Mahkamah Tinggi membenarkan responden (plaintif/SBS) untuk mencatat penghakiman terus terhadap perayu (defendan/MISC) mengenai liabiliti dengan gantirugi untuk ditaksirkan. Tuntutan plaintif adalah untuk pelanggaran kontrak oleh defendan untuk ketidak-terimaan penghantaran bunker (minyak bahan api laut, selepas ini dirujuk sebagai MBAL) dan penamatan salah Perjanjian Harga Tetap Bunker/Kontrak Harga Tetap bertarikh 16 September 2008 (selepas ini dirujuk sebagai KHT) bagi bekalan dan penyampaian MBAL kepada defendan untuk tempoh 1 Oktober 2008 hingga 31 Disember 2008. Secara ringkas, faktanya adalah pada 10 September 2008 MISC telah mengeluarkan jemputan terbuka untuk menawarkan bekalan MBAL ke arah memutuskan Perjanjian Harga Tetap Bunker. Marinehub (Malaysia) Sdn Bhd (Marinehub) menyerah tawarannya dan MISC menerimanya. Satu surat award bertarikh 16 September 2008 dikeluarkan oleh MISC kepada Marinehub yang telah diterima oleh Marinehub. Satu kontrak yang mengikatkan bagi bekalan 102,600 MT minyak bahan api laut pada harga keseluruhan USD57,435,480 setiap bulan dari 1 Oktober 2008 hingga 31 Disember 2008, pada harga tetap USD559.80/MT

dipersetujui antara MISC dan Marinehub, menggabungkan Bahagian I dan Bahagian II dari ITB dan surat award sebagai syarat-syarat Kontrak Harga Tetap (KHT). Pada masa yang sama, Marinehub pada pengetahuan MISC memasuki kontrak harga tetap dengan Scandinavian Bunkering (Singapore) Pte Ltd (selepas ini dirujuk sebagai SBS). Seterusnya, satu pertikaian berbangkit mengenai hak MISC untuk membawa ke hadapan dari Oktober 2008, 13,865 tan-tan metrik minyak bahan api laut, bagi penghantaran pada November 2008, di 'Means Platt Bunkerwire di pelabuhan yang dikontrakkan pada tarikh penghantaran' mengambilkira kl. 3.3 yang didapati di dalam dokumen-dokumen jemputan menawarkan, daripada pada harga tetap USD559.80 se tan metrik seperti yang telah dinyatakan di dalam surat award. Pada 10 November 2008 MISC membuat dua tempahan untuk MBAL yang jumlah keseluruhannya adalah 2,950 tan metrik di bawah tempahan 19 dan tempahan 20 untuk penghantaran pada kapal-kapal di Means Platt Bunkerwire rate. Berkuatkuasa 12 November 2008 Marinehub menyerahhakkan secara mutlak dan tidak boleh batal kepada Scandinavian Bunkering (Singapore) Pte Ltd (SBS) segala kepentingan-kepentingan, hak-hak, manfaat dan hakmilik Perjanjian Harga Tetap Bunker (KHT) dengan MISC. MISC membatalkan KHT melalui email bertarikh 14 November 2008 kepada Marinehub atas dakwaan-dakwaan bahawa Marinehub telah gagal mengesahkan tempahan-tempahan yang dipohon. SBS menerima penolakan KHT oleh MISC dan oleh itu mengakhiri KHT dan memohon gantirugi dari MISC untuk pelanggaran kontrak dan penamatan salah KHT. Pada 19 November 2008, peguam-peguam yang mewakili SBS memberi notis kepada MISC memohon gantirugi yang berjumlah USD27,499,371.90. Isu yang dibangkitkan di sini adalah sama ada MISC mempunyai hak untuk membatalkan KHT Bunker atas alasan-alasan bahawa Marinehub telah gagal mengesahkan tempahan 19 dan tempahan 20 pada November 2008 untuk membawa ke hadapan 2960 tan metrik dari Oktober pada harga Means Platt Bunkerwires.

Diputuskan (menolak rayuan dengan kos; mengesahkan keputusan Mahkamah Tinggi)

Oleh KN Segara HMR menyampaikan penghakiman mahkamah:

(1) MISC telah cuba membatalkan surat award bertarikh 16 September 2008 menurut kl. 2.2. Tetapi, satu penelitian rapi surat award tidak mendedahkan kl. 2.2. Oleh itu, atas alasan ini pembatalan adalah tanpa sebarang asas, tidak sah

dan menyalahi undang-undang. Klausa 3.3 yang membentukkan sebahagian daripada templat standard terma dan syarat apabila memesan bekalan MBAL tidak berniat untuk digunapakai kepada kontrak satu tempoh yang ditetapkan, kontrak harga tetap dan kontrak kuantiti tetap dan juga tiada niat untuk dipenuhkan. Tidak terdapat perjanjian bertulis dilaksanakan oleh pihak-pihak memasukkan kl. 3.3 dengan bahagian-bahagian kosong diisikan. Kontrak/Perjanjian Harga Tetap (Surat Award 16 September 2008) melalui terma dan niatnya adalah untuk memastikan bekalan MBAL pada 'harga tetap', iaitu, USD559.80 se tan metrik dan pada harga keseluruhan USD57,435,480. Ini adalah untuk menyediakan kepastian harga yang perlu dibayar oleh MISC untuk MBAL bagi tempoh tiga bulan dari 1 Oktober 2008 ke 31 Disember 2008 dan harga yang jangka boleh diterima pembekal bagi bekalan tiga bulan MBAL kepada MISC.

(2) Harga keseluruhan award USD57.435.480 dikira dari harga tetap USD559.90 se tan metrik bagi 102,600 tan metrik MBAL untuk dibekalkan dalam tempoh tiga bulan. Jika MISC mempunyai pilihan untuk membeli jilid-jilid yang tidak digunakan sebanyak 34,200 tan metrik MBAL setiap bulan pada harga pasaran dengan membawanya ke hadapan, tidak akan terdapat rujukan ke harga award keseluruhan yang telah ditentukan di dalam surat award. Satu latihan pilihan harga pasaran akan meninggalkan harga keseluruhan award berubah-ubah. Harga award keseluruhan akan naik atau turun berdasarkan naik turun harga pasaran. Dalam keadaan ini, pilihan membawa ke hadapan MBAL kepada bulan seterusnya pada harga pasaran terapung sudah tentu tidak dipertimbangkan oleh surat award atau oleh pihak-pihak terlibat pada masa yang material itu. Rujukan kepada 'harga award keseluruhan' dalam surat award mengenakan satu obligasi ke atas MISC bagi mengambil penyerahan kuantiti khusus MBAL, iaitu, 102,600 tan metrik, dalam tempoh tiga bulan pada kadar bulanan 34,200 tan metrik. Ini disahkan oleh MISC dalam kl. 5 Bahagian 1 Jemputan Untuk Menawar.

(3) Desakan-desakan perniagaan kontrak harga tetap memerlukan pihak-pihak mengunci harga bagi bekalan MBAL pada kadar tetap, bagi tempoh yang ditetapkan, tanpa apa-apa perjanjian jelas yang bertentangan. Transaksi tidak akan mengambil masuk pembawaan ke hadapan bekalan satu bukan MBAL pada harga pasaran terapung Means Platt Bunkerwire. Klausa 3.3 yang tidak lengkap mesti mengalah kepada peruntukan-peruntukan yang tertentu, jelas dan nyata mengenai harga dalam kl. 5 Bahagian I dan kl. 5 Bahagian II dokumen-dokumen Jemputan Untuk Menawar. Harga yang perlu dibayar dan tempoh KHT adalah nyata dan jelas, seperti yang dapat dilihat di dalam kl. 5 Bahagian I, kl. 5 Bahagian II dokumen-dokumen Jemputan Untuk Menawar dibaca bersama dengan Surat Award, tanpa perlaksanaan perjanjian bertulis melingkupi semua terma-terma dan syarat-syarat kontrak harga tetap tiga bulan. Dalam keadaan kes ini dan dalam konteks kontrak tiga bulan, kl. 3.3 Bahagian II dokumen-dokumen Jemputan untuk Menawar adalah tidak relevan dan tidak digunapakai pada KHT.

(4) Segala unsur-unsur liabiliti pelanggaran kontrak oleh MISC telah dibuktikan. Dalam keadaan sedemikian, dalam satu permohonan A. 14, penghakiman boleh dimasukkan dengan betul (*Avel Consultants Sdn Bhd v. Anor v. Mohamad Zain Yusof & Ors*). MISC tidak mempunyai pembelaan *bona fide* terhadap tuntutan SBS atas isu liabiliti dan hakim bicara telah dengan betul memasukkan penghakiman dengan gantirugi untuk ditaksirkan.

Case(s) referred to:

Avel Consultants Sdn Bhd & Anor v. Mohd Zain Yusof & Ors [1985] 2 CLJ 11; [1985] CLJ (Rep) 37 SC ***(refd)***

For the plaintiff - K Sivakumar (Kamraj Nayagam with him); M/s Skrine
For the respondent - S Selvaratnam (Siti Rahayu Mohd Mumazaini with him); M/s Tommy Thomas

[Appeal from High Court, Kuala Lumpur; Suit No: D-22-191-2009]

Reported by Suhainah Wahiduddin

JUDGMENT

KN Segara JCA:

[1] This is an appeal from the decision of the learned High Court judge given on 23 September 2010 granting leave to the respondent (plaintiff/SBS) to enter summary judgment against the appellant (defendant/MISC) on liability, with damages to be assessed.

[2] The plaintiff's claim is for breach of contract by the defendant for non acceptance of delivery of bunker [that is, marine fuel oil, hereinafter referred to as MFO] and the wrongful termination of the Bunker Fixed Price Agreement / Fixed Price Contract dated 16/9/2008 (hereinafter referred to as the FPC) for the supply and delivery of MFO to the defendant for the period 1 October 2008 to 31 December 2008.

[3] On 10 September 2008 MISC issued an open invitation to bid for the supply of MFO towards concluding a bunker fixed price agreement. The invitation to bid documents was in two parts. Part I stipulated the specific Scope Of Work And Outline Of Specifications and Part II set out the Terms And Conditions Of Contract.

[4] By para. 5 of part I, under the heading "commercial proposal", MISC invited tenders for:

> 1) the supply of 102,600mt ± 5% operational tolerance level (basis 34,200 mt monthly) of MFO at Singapore, for a period from 1/10/2008 to 31/12/2008.
>
> The price will be fixed for three (3) months.
>
> 2) the supply of 205,200 mt ± 5% operational tolerance level(basis 34,200 mt monthly) of MFO at Singapore, for a period from 1/10/2008 to 31/3/2009.
>
> The price will be fixed for six (6) months.

[5] Marinehub(Malaysia) Sdn Bhd (Marinehub) submitted its bid for "1)" only, that is, the supply and delivery of MFO at the price of USD560 per metric ton for a period from 1 October 2008 to 31 December 2008. The price was later revised to USD559.80 per metric ton.

[6] Marinehub did not make any bid for "2)", which is, the supply and delivery of MFO for the period 1 October 2008 to 31 March 2009.

[7] We observe that Appendix A to Part I, Form Of Statement Of Compliance To Scope Of Work And Outline Specifications and Appendix B to Part I, Form Of Compliance To Terms & Conditions Of Contract, to be completed by the bidder when making the submission to bid, are in respect of the bid for the 6 month period.

[8] There appears to be no Form Of Compliance format for the three month period bidder, as appearing in Appendix A and B to be completed by a bidder for the six month fixed price contract for the supply of MFO.

[9] We are of the opinion that the *contra proferentum* rule will operate to any suggestion that Appendix A and Appendix B is applicable to a bidder for the three month fixed price contract. MISC will have to confront with a construction least favourable as against Marinehub should it wish to place any reliance on Appendix B submitted by Marinehub to hold that Marinehub had consented to compliance to all the terms and conditions of the contract as appearing in Part II, in the absence of a formal written contract executed by the parties providing the same terms, and, in particular, cl. 3.3 which reads:

> 3.3 In the event the Buyer purchases less than ( ) (±5%) metric tons, Buyer shall have the option to carry forward the unutilized volume to the following month and such purchase shall be calculated based on the Means Platt Bunkerwire at contracted port on delivery date.

[10] Means Platt Bunkerwire rate is a fluctuating market rate.

[11] It is to be noted that no quantity is stated within the brackets in cl. 3.3 above, after the words "less than", giving rise to a serious ambiguity in relation to the volume to carry forward and the determination of the price for same, in a fixed price contract. Does it mean that if the buyer does not utilize any volume of MFO in the current month, he will be able to carry forward the whole of the unutilized volume and pay for same on the Means Platt Bunkerwire price on delivery/supply date? So, if market prices are well below the agreed fixed price, does the buyer

have the choice to elect between the agreed fixed price and the fluctuating prices in his favour based on the Means Platt Bunkerwire in respect only of the unutilized quantity carried forward at his option? No reasonable businessman (in particular the supplier) entering into a fixed price contract would want uncertainty to creep in by such an absurd construction. And, what happens if in every month of a three month fixed price contract the buyer does not utilize any of the volume for each of the particular month? Can he thus avoid the fixed price, by carrying forward every month, and then insist that the price be the Means Platt Bunkerwire Platt for the volume carried forward? A B C

[12] We hold that it does not make any business sense and would be repugnant and contrary to any commercial transaction involving a fixed price contract for the supply of marine fuel to impose a term (in the absence of any unequivocal agreement to the contrary) that the fluctuating market price per metric ton on delivery date is to prevail for any unutilized volume carried forward from the current month, *in lieu* of the agreed fixed price per metric ton that was to prevail throughout the contract period. D

[13] Now, moving on, the pertinent facts relevant to this appeal before us are as follows: E

[14] MISC accepted Marinehub's bid for the supply and delivery of the MFO. A letter of award dated 16 September 2008 was issued by MISC to Marinehub. It was duly accepted by Marinehub. The letter reads: F

> 16th September 2008
> Marinehub (Malaysia) Sdn Bhd
> ... G
>
> Tender For Bunker Fixed Price Agreement At Singapore From 01st October 2008 To 31st December 2008
>
> We have the pleasure in awarding the above Tender for the supply of Marine Fuel Oil (380CST) 102,600 MT ±5% operational tolerance level for the period from 01st October 2008 to 31st December 2008 at a fixed price of USD559.80/MT at a total award price of USD57,435,480 (United States Dollar: Fifty Seven Million Four Hundred Thirty Five Thousand And Four Hundred Eighty Only). H I

A This Contract is subject to the following:

i) MISC Invitation to Bid document No. TCM 45/2008, issued on 10th September 2008 for Bunker Fixed Price Agreement at Singapore (hereinafter referred to as ITB).

B ii) Your Technical and commercial Bid proposals dated 15th September 2008.

iii) Confirmation to revise commercial proposal by telephone and email on 15th September 2008.

C iv) Payment to Seller made in United States Dollars (USD).

v) The above Contract is effective from 01st October 2008 to 31st December 2008

The documents above mentioned together with this Letter of
D Award shall, therefore constitute a binding Contract between Marinehub (Malaysia) Sdn Bhd And Misc Berhad pending the execution of the formal agreement. You will be notified when the agreement is ready for execution.

No information concerning this Letter of Award or in respect of
E the Award, which is to be signed by MISC Berhad, shall be released publicly by you without prior written approval from MISC Berhad.

Terms defined herein shall have the same meaning as Terms
F defined in the ITB.

This Letter of Award is sent to you in duplicate. Please indicate your acknowledgement and agreement within one (1) day(s) from the receipt of this Letter of Award.

G **[15]** The formal agreement between the parties as envisaged in the letter of award was not signed. No explanation was proffered. Perhaps, because of the volatile fluctuating price for bunker, MISC did not wish to be bound by a formal written agreement that could curtail its options to negotiate/terminate the fixed price
H (short-term) agreement.

[16] Nevertheless, upon the acceptance of the letter of award, a binding contract for the supply of 102,600 MT marine fuel oil ±5% operational tolerance level, at the total price of USD57,435,480 on the monthly basis of 34,200MT from
I 1 October 2008 to 31 December 2008, at the fixed price of

USD559.80/MT, was concluded between MISC and Marinehub, incorporating Part I and Part II of the ITB and the letter of award as the terms of the fixed price contract(FPC). Simultaneously, and back to back with the MISC/Marinehub FPC, Marinehub to the knowledge of MISC entered into a fixed price contract with Scandinavian Bunkering (Singapore) Pte Ltd (hereinafter referred to as SBS) whereby Marinehub purchased the same quantity 34,000 metric tons ± 5% of MFO per month for each month at a fixed price of USD557.50 per metric ton for the same fixed period from 1 October 2008 to 31 December 2008 for delivery to MISC's vessels.

[17] MISC took delivery of 20,334.59 metric tons of MFO for the month of October 2008. There remained 13,865 metric tons of MFO for MISC to accept delivery in October 2008.

[18] A dispute arose as to MISC's alleged entitlement to carry forward from October 2008, the 13,865 metric tons of MFO, for delivery in November 2008, at the "Means Platt Bunkerwire at the contracted port on delivery date" by virtue of cl. 3.3 found in the invitation to bid documents, rather than at the fixed price of USD559.80 per metric ton as set out in the letter of award.

[19] On 10 November 2008 MISC sought to place two orders for MFO amounting in total to 2,950 metric tons under order 19 and order 20, for delivery to the vessels MV WAN HAI 605 and MV BUNGA MAS 9, respectively, at Means Platt Bunkerwire rate.

[20] It is to be noted that the MISC/Marinehub Fixed Price Contract was entered into, arising from the letter of award, upon MISC's initiative in September 2008 to invite the most competitive bid for the supply and delivery of MFO to MISC, to control and fix MISC's MFO costs over the future months of October, November and December 2008. Therefore, legally and commercially, it would be unacceptable to Marinehub and unreasonable for MISC to place MFO order 19 and order 20 for delivery at Means Platt Bunkerwire rate, as opposed to the FPC price of USD559.80 per metric ton.

[21] In the above circumstances, Marinehub informed MISC on 11 November 2008 that it was ready and willing to deliver the required MFO under order 19 and order 20 provided the price payable by MISC was the FPC price of USD559.80 per metric ton. Alternatively, Marinehub was ready to supply and deliver MFO to MISC at Means Platt Bunkerwire price provided the price differential as compared with the FPC price was paid by MISC.

[22] With effect from 12 November 2008 Marinehub assigned absolutely and irrevocably to Scandinavian Bunkering (Singapore) Pte Ltd [SBS] all its rights interest, benefit and title to the Bunker Fixed Price Agreement (FPC) with MISC. Notice of Assignment, dated 12 November 2008, was given by Marinehub to MISC and was received by MISC on 13 November 2008. SBS is the same party with which Marinehub had entered into a fixed price contract, back to back with the FPC, for the supply of MFO to MISC's vessels. Neither the invitation to bid documents nor the letter of award prohibits an assignment of the Bunker Fixed Price Contract.

[23] MISC terminated the FPC by its E-mail dated 14 November 2008 to Marinehub on the alleged grounds that Marinehub failed to confirm order 19 and order 20.

[24] SBS accepted MISC's repudiation of the FPC and thereby brought to an end the FPC and sought damages from MISC for breach of contract and wrongful repudiation of the FPC.

[25] On 19 November 2008 the solicitors for SBS gave notice to MISC claiming damages in the sum of USD27,499,371.90. The letter reads, *inter alia*:

> Re: Bunker Fixed Price Contract Dated 16th September 2008 Made Between Misc Berhad And Marinehub (Malaysia) Sdn Bhd
>
> We act for Scandinavian Bunkering (Singapore) Pte Ltd and refer to the above captioned matter, which, under your Contract with Marinehub, you undertook to purchase 34,200mt of bunkers per month from them for the months of October 2008, November 2008 and December 2008. In respect of the month of October 2008 you purchased less than the contracted quantity and subsequently, you wrongfully terminated the Contract. As you know Marinehub had a similar contract with our clients for the bunkers to be supplied by our clients.

By an Assignment made on 12th November 2008, written notice of which had been given to you, Marinehub (Malaysia) Sdn Bhd ("Marinehub") had assigned all their rights, interests (present and future), benefit and title to, in connection with or in respect of the above-captioned Contract to our clients.

In this connection, our clients have written to you on 14th November 20087 by email timed 1415 hours, reserving all rights against you. However, we note that you continued to communicate with Marinehub by your email dated 17th November (timed 1455 hours) to En Zainal of Marinehub. You do so at your own peril. We request you to address all your correspondences relating to this matter to us.

In reply to your email of 17th November 2008 (timed 1455 hours), the assignees' position is, the Notice of Assignment is effective against you. Your consent to the assignment is not required. If you insist otherwise, kindly explain. We do not see how bunkers could be supplied to you for the vessels you mentioned when you refused to place orders in accordance with the Contract. Further you had wrongfully terminated the contract. These reasons are sufficient to raise claims against you.

We are instructed to and hereby give you notice that your wrongful termination of the Contract has caused the following loss, damage and expense:

1. Price differential between the Scandinavian Bunkering (Singapore) Pte Ltd-Marinehub Contract and the MISC Berhad-Marinehub Contract calculated as follows:

   ...

2. Loss of Scandinavian (Singapore) Pte Ltd for which Marinehub is liable and calculated as follows:

   ...

3. Wasted expenditure

   ...

TOTAL	USD27,499,371.90

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> Notice Is Hereby Given that unless the sum of USD27,499,371.90 is received by our clients within the next 3 days, they will commence action for recovery without further reference. In that event ...
>
> ...
>
> ...

B

[26] Obviously, the price of MFO dropped in October and November 2008. MISC then attempted to resile from its contractual obligation under the Bunker Fixed Price Agreement to purchase 102,600 metric tons of Marine Fuel Oil at a fixed price of USD559.80 per metric ton for the period 1 October 2008 to 31 December 2008, pursuant to the letter of award, by wrongfully insisting on paying only the lower Means Platt Bunkerwire price for the unutilized October 2008 quantities of MFO and then wrongfully terminating the Bunker Fixed Price contract without accepting the remaining quantities for November and December 2008. MISC attempted to enter into a new contract for November and December 2008 at the spot price. This is clearly reflected in the e-mail to Marinehub sent by MISC on 7 November 2008 5:50pm. It reads:

C

D

E

> Subject: Bunker Fixed Forward Contract - Final Proposal
>
> Reference is made to our discussion today, 07/1/08 at 5:00pm on the above matter
>
> Please find below our final proposals:
>
> 1 MISC is committed to pay Marinehub for the price differential claim for unutilized balance in October amounting to USD2,048,360.60
>
> PROVIDED
>
> 2 Marinehub & MISC enter into a new contract for November & December 2008 at the committed quantity but at the spot price.

F

G

H

[27] We are unanimous that the only issue before us is whether MISC has a right to terminate the Bunker FPC on the grounds that Marinehub failed to confirm order 19 and order 20 in November 2008 for the carry forward of 2950 metric tons from October at Means Platt Bunkerwire price.

I

[28] MISC's order 19 by e-mail sent on 10 November 2008 4:15pm reads (the relevant parts): A

...

Date To Supply : 15th November 2008

Spec/Quantity : MFO 380cst (RMG380) 2600MT B

Note:

1. This Order Is For The Carry Forward Balance From October 2008 C

2. Please Invoice Us Based On Mean Platts Bunkerwire At Contracted Port On Delivery Date

3.

4. D

...

Kindly Confirm/Acknowledge This Confirmation Order.

... E

[29] MISC's order 20 by e-mail sent on 10 November 2008 4:25pm reads (the relevant parts):

Date To Supply : 17th November 2008 F

Spec/Quantity : MFO 380CST (RMG380) 350MT

Note:

1. For MFO380CST, The Order Is For The Carry Forward Balance From October 2008 G

2. Please Invoice Us Based On Mean Platts Bunkerwire At Contracted Port On Delivery Date

3. H

...

Kindly Confirm/Acknowledge This Confirmation Order.

... I

[30] By e-mail sent on 11 November, 2008 11:28am Marinehub responded MISC's order 19 and 20 as follows (the relevant parts):

> Our reply is as follows;
>
> 1. Clause 3.3 as canvassed by MISC is not acceptable to Marinehub.
>
> 2. Clause 3.3 states no quantity. So it follows that no quantity was agreed to be carried forward.
>
> Marinehub does not alter the signed contract in any way.
>
> 3. All supplies of bunkers from Marinehub to MISC from November 2008 and onwards were not and will not be for any carrying forward of October 2008 quantities.

[31] On 13 November, 2008 12:49pm MISC e-mailed Marinehub giving 24 hours to confirm order 19 and order 20. It reads:

> Reference is made to our orders placed on 10th November 2008 for both MV Bunga Mas (...) and MV Wan Hai 605 (...). We note that you have not confirmed our orders. Please be reminded that if you do not do so within the **next 24** hours, **we will be terminating our Letter of Award of 16/09/08**
>
> (emphasis added)

[32] Following, thereafter, on 14 November, 2008 9:37am MISC e-mailed Marinehub terminating the letter of award dated 16 September 2008. It reads:

> As at to date, we have not received any confirmation from you on the orders as per my email below. Hence, we will terminate our **Letter of Award dated 16/09/08** pursuant to **clause 2.2 of the same**.
>
> (emphasis added)

[33] We wish to immediately observe that MISC has purported to terminate the letter of award dated 16 September 2008 pursuant to "cl. 2.2" However, a close scrutiny of the letter of award (see extract above) does not disclose "cl. 2.2". Therefore, on this very ground itself the termination would be without any basis, unlawful and void.

[34] In any event, we are unanimous that MISC's liability turns entirely on whether cl. 3.3 of part II of the invitation to bid documents applies to the FPC to entitle MISC to carry forward unutilized MFO from October 2008 to November 2008 at the Means Platt Bunkerwire price, as opposed to the tendered and contracted FPC Price of USD559.80 per metric ton.

[35] We agree with the trial judge that cl. 3.3 which forms part of MISC's standard template of terms and conditions when calling for the supply of MFO was never intended to apply to a fixed term, fixed price and fixed quantity contract and was never intended to be filled up. There was no written agreement executed by the parties incorporating cl. 3.3 with the blanks duly filled up.

[36] The fixed price contract/agreement (letter of Award 16/9/08) by its very term and purpose is to ensure the supply of MFO at a "fixed price", that is, at USD559.80 per metric ton and at a total award price of USD57,435,480. This is to provide certainty of the price MISC would have to pay for MFO over the period of three months from 1 October 2008 to 31 December 2008 and the price the supplier can expect to receive for its three months supply of MFO to MISC.

[37] The total award price of USD57,435,480 is computed on the fixed price of USD559.80 per metric ton for 102,600 metric tons of MFO to be supplied over three months. If MISC had an option to purchase unutilized volumes up to 34,200 metric tons of MFO per month at market price by carrying it forward, there would have been no reference in the letter of award to the predetermined total award price. An exercise of the option at market price would leave the total award price fluid. The total award price would have increased or decreased based on the market price fluctuations.

[38] In the circumstances, we are of the view an option to carry forward MFO to the following month at a floating market price was certainly not contemplated by the letter of award or by the parties at the material time.

[39] We are unanimous that the reference to the "total award price" in the letter of award imposes an obligation on the part of MISC to take delivery of specific quantity of MFO namely, 102,600 metric tons, over a period of three months at a monthly rate of 34,200 metric tons. This is confirmed by MISC in cl. 5 of part I of the invitation to bid.

[40] We are unanimous that business exigencies of a fixed price contract require parties to lock the price for the supply of MFO at the fixed rate, for a fixed period, in the absence of any unequivocal agreement to the contrary. The transaction will not admit a carrying forward of an entire month's supply of MFO at a floating market price of the Means Platt Bunkerwire. The incomplete cl. 3.3 must yield to the certain, clear and express provisions as to price in cl. 5 part I and cl. 5 part II of the invitation to bid documents.

[41] We hold that the price payable and the period of the FPC are plain and unambiguous, as seen in cl. 5 part I, cl. 5 part II of the invitation to bid documents read together with the letter of award, in the absence of a duly executed written agreement embodying all the terms and conditions for the three month fixed price contract. We hold that, in the circumstances of this case and in the context of the three month contract, cl. 3.3 of part II of the invitation to bid documents is irrelevant and inapplicable to the FPC.

[42] We are unanimous that all elements on liability for breach of contract by MISC had been made out. In that event, in an order 14 application, judgment can be properly entered on liability with damages to be assessed (see *Avel Consultants Sdn Bhd & Anor v. Mohd Zain Yusof & Ors* [1985] 2 CLJ 11; [1985] CLJ (Rep) 37.

[43] We are further unanimous that MISC has no *bona fide* defence to SBS's claim on the issue of liability and that the trial judge had correctly entered judgment with damages to be assessed.

[44] Appeal is dismissed with costs fixed at RM50,000. Decision of High Court affirmed. Deposit refunded to appellant.